## DIRECTOR-GENERAL OF INLAND REVENUE v. T.M. SDN. BHD.

**[F.C. (Azmi L.P., Ali and Ong Hock Sim F.JJ.) February 15, 1974]**

**[Kuala Lumpur — Federal Court Civil Appeal No. 12 of 1973]**

*Income Tax — Deduction — Income from working of mine — Capital expenditure — Qualifying mining expenditure — Whether money paid for acquisition of mine is capital expenditure in connection with carrying on of mining operations — Income Tax Act, 1967, s. 34 and Schedule 2.*

This was an appeal from the decision of the High Court ([1973] 1 M.L.J. 71) confirming the decision of the Special Commissioners whereby it was held that a sum of $2.5 m. being the purchase price of a mine was deductable as "capital expenditure" under section 34(6)(c) of the Income Tax Act, 1967.

**Held,** allowing the appeal: capital expenditure to qualify for deduction under section 34(6)(c) of the Income Tax Act, 1967, must be expenditure in connection with or in preparation for the working of the mine and does not include the capital expended for the acquisition of the mining land.

FEDERAL COURT.

*Mohamad Nizar bin Idris* (Senior Federal Counsel) for the appellant.

*J. J. Puthucheary* for the respondent.

**Ali F.J.:** This is an appeal by the Revenue from the decision of the High Court whereby it was held that a sum of $2.5 million being the purchase price of a mine, Batu Tiga, in Trengganu was deductable capital expenditure under section 34(6)(c) of the Income Tax Act, 1967 (hereinafter referred to as the Act). That provision reads as follows:

"34. (6) There may be deducted from the relevant gross income —

(a) x x x

(b) x x x

(c) where any part of the relevant gross income is derived from the working of a mine, such amounts in respect of capital expenditure as may be allowed for the relevant period pursuant to Schedule 2."

The same decision was reached by the Special Commissioners of Income Tax when the matter came before them for the first time as an appeal from the taxpayer company, T.M. Sdn. Berhad. The decision was to the effect that paragraph 41 of Schedule 9 to the Act applies.

In terms of section 34(6)(c) as referred to above it is clear that deductable capital expenditure is such amount as may be allowed for the relevant period pursuant to Schedule 2. Schedule 2 being part of the Act came into effect on January 1, 1968 and, therefore, applies only to such expenditure as may be incurred on or after that date. But the $2.5 million in this case seems to have been incurred on January 1, 1967. The mine in question was purchased by the taxpayer company from Eastern Mining and Metals Co. Ltd. (EMMCO) under an agreement dated December 31, 1966 and by its terms the purchaser was given the right to occupy, enjoy and work the mine as from January 1, 1967. In an exchange of letters, all written in December, 1966, the consideration for this purchase was fixed at $2.5 million. In support of the claim that this amount is expenditure allowed pursuant to Schedule 2 to the Act the taxpayer company have contended that paragraph 41 of Schedule 9 applies. When the dispute was before the Special Commissioners and the High Court the said paragraph had not been amended and was in these terms:

"41. For the purposes of Schedule 2, where the operator owned an asset at the beginning of the basis period for the year of assessment 1968 and has incurred capital expenditure as defined in the Income Tax (Mining Operations) Rules, 1949, of West Malaysia on or for the asset in connection with the working of the mine —

(a) the asset shall be deemed to be included in the definition of 'mining asset' in paragraph 6 of that Schedule; and

(b) that capital expenditure shall be treated as qualifying mining expenditure."

Relying on January 1, 1967 as the date on which they became the owners of the mine which, incidentally, was the beginning of the basis period for the year of assessment 1968 and also relying on the fact that $2.5 million was paid for the mine as expenditure of a capital nature, the taxpayer company have maintained that the said paragraph as unamended should apply. As against this contention the Revenue have advanced various arguments of which some only would seem to have a bearing on the issue in dispute. The issue turns almost entirely on the construction of paragraph 41 which if applicable must result in the dismissal of this appeal.

The Special Commissioners have concluded that it applies. The High Court, on a case stated for its opinion has also come to the same conclusion. In his judgment Gill F.J. who heard the case stated said thus:

"....The money was clearly paid for the acquisition of the mine which was the site of the source of the mineral deposits. The mine being the site of the source of mineral deposits, it was an asset on or for which the respondents had incurred the capital expenditure of $2.5 million. How then can it be said that paragraph 41 of Schedule 9 does not apply to the facts of this case?"

In other words "capital expenditure" as defined in rule 2(ii)(a) of the Income Tax (Mining Operations) Rules, 1949 (L.N. 534 of 1949) includes money paid as consideration *for the acquisition* of the mine. The proposition used in sub-rule (a) is not "for" but "on". In any case the preceding words "expenditure in connection with the carrying on of mining operations" when read in terms of the definition of "mining operations" in rule 2(v) would seem to refer to the net sum spent on method or process used for winning or obtaining minerals. In order to carry on mining operations the mine must first be purchased and read in this context capital expenditure as defined cannot mean the price paid for the purchase of the mine. Turning back to paragraph 41 it must be observed that it speaks of an operator who owned an "asset" which in terms of this paragraph cannot mean "mine". This is clear from the words "on or for the *asset* in connection with the working of the *mine*".

It is necessary to refer again to rule 2(ii) of the Income Tax (Mining Operations) Rules, 1949. It reads thus:

" 'capital expenditure' means expenditure in connection with the carrying on of mining operations incurred:

(a) on the acquisition of the site of the source of mineral deposits, or the site of any works as defined under subparagraph (c), or of rights in or over any such site or rights in or over the deposits; or

(b) on searching for or on discovering and testing deposits, or winning access thereto; or

(c) on the construction of any works which are likely to be of little or no value when the source is no longer worked; or

(d) on development, general administration and management prior to commencement of production or during any period of non-production;

Provided that the expression does not include — expenditure in respect of which a deduction is allowed under any other provision of the Ordinance (the Income Tax Ordinance, 1947) and in particular does not include expenditure on plant and machinery, and extraordinary expenditure within the meaning of section 22c of the Ordinance;"

As already stated the words "in connection with the carrying on of mining operations" presuppose that the mine has already been bought. Quite apart from that the proviso to rule 2(ii) refers to plant and machinery, the expenditure on which is not to be included in the expression "capital expenditure". The reason for the exclusion, I think, is because at some previous stage the value of such plant and machinery as assets has already been taken into account for the purpose of deduction. See the definition of "recoupment of capital expenditure" in rule 2(vi) and rule 7 which deals with change of ownership of the mine. Consideration as referred to in rule 7 clearly does not mean capital expenditure as defined. The mine in question was bought from Eastern Mining and Metals Co. Ltd. or EMMCO in 1967 and this may well involve the consideration as to the applicability of rule 7 in the computation of EMMCO's assessable income. But that is not a matter which we have to consider in this appeal. What falls to be considered is, whether the $2.5 million in this case is capital expenditure as defined in the Income Tax (Mining Operations) Rules, 1949. On the view I have taken it is not and paragraph 41 of Schedule 9 cannot, therefore, apply.

Accordingly, I would allow this appeal with costs here and below.

As regards the cross-appeal by the taxpayer company against the order of costs made by the High Court, this need not cause much difficulty. In view of the decision in this appeal the order of costs will have to stand and the cross-appeal is, therefore, dismissed. There will be no order as to costs on the cross-appeal for in my opinion the taxpayer company was not unjustified in cross-appealing. Upon the view taken by the High Court the order as to costs should have been against the Revenue. Both parties in this appeal agreed with this. So I need say no more about the cross-appeal.

**Azmi L.P.** concurred.

**Ong Hock Sim F.J.:** This is an appeal from the decision of Mr. Justice Gill F.J. setting aside the Deciding Order of the Special Commissioners and amending the additional assessments of income tax for the years of assessment 1968, 1969 and 1970 as per three notices dated March 24, 1971 so as to allow a sum of $625,000 as qualifying mining expenditure in respect of each of those years. There is also a cross-appeal praying for (1) restoration of the order of the Special Commissioners (2) reversing the decision to deduct the $2.5 million in equal parts over four years and (3) setting aside the award of costs to the appellant.

The Case Stated by the Special Commissioners of Income Tax for the opinion of the High Court pursuant to paragraph 34 of Schedule 5 to the Income Tax Act, 1967 involved the ascertainment of the proper qualifying mining expenditure incurred by the respondents in connection with the working of a mine for the purposes of Schedule 2 of the Income Tax Act, 1967. It is only necessary to summarise the main facts which, in my view, the Special Commissioners took into account in arriving at their Deciding Order, namely:

(1) Eastern Mining & Metals Co. Ltd., a company incorporated on August 5, 1948, (for ease of reference, hereinafter called "EMMCO"), purchased 1,180.1 acres of mining leases, of which nearly 1,080 acres were mining lands, in the District of Dungun, State of Trengganu, from the Custodian of Enemy Property some time in 1948.

(2) The respondents, an Associate of EMMCO, was incorporated on March 12, 1956 and has a common directorship with EMMCO.

(3) On December 31, 1966 the two companies entered into an agreement for sale of the Batu Tiga Mine to the respondents with effect from January 1, 1967. By an exchange of letters dated December 24, 30 and 31, 1966 *the consideration of the sale* was fixed at $2.5 million.

(4) Pursuant to the agreement, the respondents entered into possession with right to occupy, enjoy and work the mine.

(5) The lands and leases of EMMCO, including the Batu Tiga Mine were valued as at January 1, 1955 at $133,149.40 but were subsequently re-valued by mining consultants on the Hoskold Present Value formula at a little over $25 million as at the end of 1955.

(6) The appellant sought information from EMMCO and the respondents as to (1) the original cost of the Batu Tiga Mine and (2) all expenditure incurred in the development thereof from the time of its acquisition from the Custodian of Enemy Property to date of its sale on December 31, 1966. *No such information was available on either the original cost or the expenditure incurred.*

(7) Quoting sub-paragraph (n) of paragraph 6 of the case stated:

"In the circumstances, the appellant valued the original cost of Batu Tiga mine thus; EMMCO sold Batu Tiga mine to the respondents on 31st December, 1966, for $2.5 million which amounted to 10% of the total value of $25 million, which was the revalued figure in 1955; therefore, on this basis the original cost of Batu Tiga would be 10% of $133,149.40, the value shown in EMMCO's ledger as at 1st January, 1955. Ten per centum of $133,149.40 would be $13,314.90 but for convenience sake the appellant rounded this up to $20,000."

It would be apparent only the first of the two matters mentioned in (6) above was "answered" but expenditure incurred in the development which was perhaps the issue for determination was left unanswered. In any event, I doubt that would in any way assist the respondents.

After argument, the Special Commissioners found and decided and I quote the relevant paragraphs of the deciding order:

"(a) that the Eastern Mining and Metals Co. Ltd. sold their Batu Tiga mine, situated in the State of Trengganu, to the appellants, the T.M. Sdn. Berhad, by an agreement dated 31st December 1966, and by an exchange of letters dated 24th, 30th and 31st December, 1966, for the consideration of $2.5 million, giving to the appellants the right to occupy, enjoy and work the mine with effect from 1st January, 1967;

(b) that, by virtue of the aforesaid sale, the appellants owned a mining asset, namely, the said Batu Tiga mine, at the beginning of the basis period for the year of assessment 1968, and had incurred capital expenditure in the said sum of $2.5 million within the meaning of paragraph 41 of Schedule 9 of the Income Tax Act, 1967;

(c) that, pursuant to the provisions of paragraph 41 of the said Schedule 9, and the provisions of the Income Tax (Mining Operations) Rules, 1949, as specified in the said Schedule 9, the capital expenditure of $2.5 million is qualifying mining expenditure for the purposes of Schedule 2 of the Income Tax Act, 1967, entitling the appellants to deductions in respect thereof from the relevant gross income in the ascertainment of their adjusted income in accordance with the said Schedule 2; and."

By notice dated January 24, 1972, the appellant required a Case Stated for the opinion of the High Court on "the question of law ... whether on the facts found ... there is evidence to support our decision"

Various grounds were urged on behalf of the appellant, but, in my view, the most cogent point is whether the sum of $2.5 million was or was not capital expenditure within the meaning of paragraph 41 of Schedule 9 of the Act and the Income Tax (Mining Operations) Rules 1949 *and* "qualifying mining expenditure" entitling the respondents to deductions from the relevant gross income in the ascertainment of their adjusted income in accordance with Schedule 2. If this were decided in favour of the appellant, there would be no need to deal with the other grounds.

This would appear to be dependent therefore solely on construction, namely *what capital expenditure is "qualifying mining expenditure" as defined.* As appears from the record, the Special Commissioners were charged with "ascertainment of the proper qualifying mining expenditure incurred ... *in connection with the working of a mine* for the purposes of Schedule 2". They determined, as stated earlier, *the original cost* of Batu Tiga at 10% of the estimated cost to EMMCO. It was held by the Special Commissioners that paragraph 41 of Schedule 9 was applicable in ascertaining the qualifying mining expenditure for purposes of Schedule 2 and this was accepted by the respondents.

In my opinion, there appears to be some confusion arising from failure to appreciate just what capital expenditure on mines is entitled to deduction. As the learned judge rightly observed: "The general principle with regard to deduction of expenses for the purpose of ascertaining the adjusted income of a person is that expenses which are of a revenue nature, that is, expenses incurred in the production of income, are deductible. On the other hand, *capital expenditure is generally not deductible.* However tax payers engaged in mining operations are given *certain concessions* in that certain items of expenditure, though capital in nature, are expressly allowed as deductions under the Income Tax Act, 1967" and he quotes:

"34(6)(c) There may be deducted from the relevant gross income — *where any part of the relevant gross income is derived from the working of a mine,* such amounts in respect of capital expenditure as may be allowed for the relevant period pursuant to Schedule 2."

Is this such a concession as earlier mentioned by the judge? It should be noted that this deduction is in relation to that *"part of the relevant gross income — derived from the working of a mine"* and is referable to Schedule 2. Paragraph 1 reads:

"Subject to paragraph 2, *qualifying mining expenditure* for the purposes of this Schedule is *expenditure* which is *incurred in connection with the working of a mine or in preparation for the working of a mine".*

Sub-paragraphs (a) (b) (c) and (d) are relevant, I think, only as to the *expenditure* incurred in connection with the working of a mine *on* the occasions specified thereunder and are *not* categories of expenditure within rule 2(ii) of the 1949 Rules (almost identical to paragraph 1). This is apparent when paragraph (c) of the deciding order speaks of "the consideration of $2.5 million ... for the right to occupy, enjoy and work the mine". There is no doubt that the respondents "had incurred capital expenditure in the said sum of $2.5 million". How this expenditure becomes "qualifying mining expenditure for the purposes of Schedule 2 ... entitling the appellants to deductions in respect thereof from the relevant gross income in the ascertainment of their adjusted income" is unfortunately not stated by the Commissioners. In the Case Stated at paragraph 6(h) and (i), it is noted that "the *consideration* of the sale *was fixed at $2.5 million"* and *"Resolutions confirming the purchase and sale* of the Batu Tiga mine *were passed".* Again, as it has been conceded that paragraph 41 to Schedule 9 applied, I would reproduce that paragraph. It reads:

"41. For the purposes of Schedule 2, where the operator owned an asset at the beginning of the basis period for the year of assessment 1968 *and has incurred capital expenditure as defined* in *the Income Tax (Mining Operations) Rules, 1949,* of West Malaysia *on or for the asset in connection with the working* of the mine —

(a) the asset shall be deemed to be included in the definition of 'mining asset' in paragraph 6 of that Schedule; and

(b) that capital expenditure to the extent allowed or determined to rank as capital expenditure under the Income Tax (Mining Operations) Rules, 1949, of West Malaysia shall be treated as qualifying mining expenditure."

"Mining Asset" is defined in paragraph 6 to Schedule 2 to mean "either the mine or an asset *on or for which the operator has incurred qualifying mining expenditure in connection with or in preparation for the working of the mine".* What is the definition under the Income Tax (Mining Operations) Rules, 1949? It reads:

"2. Under these Rules —

(ii) 'capital expenditure' means expenditure *in connection with the carrying on of mining operations incurred*:

(a) on the acquisition of the source of mineral deposits, or the site of any works as defined under sub-paragraph (c), or of rights in or over any such site or rights in or over the deposits:".

With respect, I am unable to agree that the italicized words have absolutely no meaning or that, on a proper construction, that expenditure *on* acquisition of the mine should be read as expenditure *for* acquisition of the mine. It was stated on behalf of the respon-

dents that "the sum of $2.5 million paid by the respondents... was *not* for the land alone but also for the houses, water and electric facilities." That this misconception as to what constitutes "qualifying mining expenditure" was carried over to the High Court appears from the judgment, wherein the learned judge said "On appeal to the Special Commissioners, the respondents claimed that the sum of $2.5 million which they *paid as the purchase price... should have been treated as qualifying mining expenditure*", and further "the sole question for determination in this appeal is whether the respondents are entitled to have the sum of $2.5 million deducted from their gross income." and "the second reason given for the second condition not having been satisfied is that, even assuming that the $2.5 million is the *cost of Batu Tiga mine* and therefore capital expenditure within the meaning of rule 2(ii)(a) of the Income Tax (Mining Operations) Rules, 1949, *such expenditure was not expenditure incurred on or for the asset in connection with the working of the mine* as stipulated in paragraph 41 of Schedule 9. With all respect to the learned counsel for the appellant, this argument is a mere quibble. *The money was clearly paid for the acquisition of the mine*". When the judgment went further to say "The mine being the site of the source of mineral deposits, it was an asset on or for which the respondents had incurred the capital expenditure of $2.5 million." This overlooks the definition in paragraph 6 to Schedule 2, earlier quoted, that *the asset* referred to a mine *on or for which* the operator has incurred *"qualifying mining expenditure"* (not capital expenditure) *"in connection with or in preparation for the working of the mine"*.

I respectfully disagree, having regard to the definition of "mining asset" that "the mine being the site of the source of mineral deposits, it was an asset *on or for which the respondents had incurred* the capital expenditure of $2.5 million". That capital expenditure to qualify for deduction must be expenditure *"in connection with or in preparation for the working of the mine"*. I regret I cannot read "capital expenditure" in the 1949 Rules to include the capital expended for acquisition of mining land and hold the words "in connection with the carrying on of mining operations" to have been inserted without any intention to give them effect. Schedule 2, unlike the 1949 Rules, defines "Qualifying mining expenditure" and not "capital expenditure". Be that as it may, deductions that are permissible do not extend, in my view, to capital cost or consideration.

With respect to the learned judge and to the Special Commissioners, I am of the opinion that they have erred in law in treating consideration for the sale of Batu Tiga as qualifying mining expenditure within the meaning of paragraph 41 of Schedule 9 of the Income Tax Act, 1947, and as such, for purposes of Schedule 2, entitling them to deductions in respect thereof from the relevant gross income in the ascertainment of their adjusted income. I would accordingly allow the appeal and set aside the order of the High Court and of the Special Commissioners with costs here and in the court below.

It also follows that the cross-appeal must be dismissed but without costs, as it was necessitated by an error of the judge then to have awarded costs against the respondents when the appellant had not in effect succeeded in reversing the decision of the Special Commissioners but the judge had merely varied their decision.

*Appeal allowed.*

Solicitors: *Skrine & Co.*

---

## NAJAR SINGH v. GOVERNMENT OF MALAYSIA & ANOR.

**[F.C. L.P., Suffian C.J. and Ong Hock Sim F.J.)**
**February 15, 1974]**

**[Kuala Lumpur — Federal Court Civil Appeal No. 126 of 1973]**

*Administrative Law — Dismissal of police officer — Proceedings taken under Public Officers (Conduct and Discipline) (General Orders Chapter D) Regulations, 1969 — Reasonable opportunity to be heard — No oral hearing given — Federal Constitution, art. 132.*

The appellant who was a police officer was detained under an order issued by the Minister of Home Affairs. Whilst in detention he received a statement in writing sent by the Police Force Commission pursuant to General Order 30(2) of the Public Officers (Conduct and Discipline) (General Orders, Chapter D) Regulations, 1969 requiring him to show cause why he should not be dismissed from the Police Force. The appellant sent a written reply to the Police Force Commission.

The appellant was dismissed from the police force and he sought *(inter alia)* a declaration that his dismissal was void. The High Court dismissed his claim ([1973] 2 M.L.J. 191) and the appellant appealed to the Federal Court.

**Held,** dismissing the appeal: (1) in this case although the respondents could have proceeded against the appellant either under the Public Officers (Conduct and Discipline) (General Orders Chapter D) Regulations, 1969 or the Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations, 1970, they were within their rights in choosing to proceed under the 1969 Regulations (Chapter D);

(2) in any case, even when proceeding against the appellant under the 1969 Regulations (Chapter D) the respondents should have given him a reasonable opportunity of being heard;

(3) in the circumstances of this case an oral hearing was unnecessary and the respondents had given the appellant a reasonable opportunity of being heard.

*Cases referred to:-*

(1) *Haji Ariffin* v. *Government of Pahang* [1969] 1 M.L.J. 6.
(2) *Surinder Singh Kanda* v. *Government of the Federation of Malaya* [1962] M.L.J. 169.
(3) *Ridge* v. *Baldwin* [1964] A.C. 40.
(4) *Durayappah* v. *Fernando* [1967] 2 A.C. 337.
(5) *Board of Education* v. *Rice* [1911] A.C. 179.
(6) *Mahadevan* v. *Anandarajan & Ors.* [1974] 1 M.L.J. 1.
(7) *Regina* v. *Aston University Senate, Ex parte Roffey & Anor.* [1969] 2 Q.B. 539.
(8) *Ceylon University* v. *Fernando* [1960] 1 W.L.R. 223.
(9) *Byrne* v. *Kinematograph Reuters Society Ltd.* [1958] 1 W.L.R. 762, 784; [1958] 2 All E.R. 579.

FEDERAL COURT.

*N. A. Marjoribanks* (*Lall Singh Makher* with him) for the appellant.

*Mokhtar bin Haji Sidin* (Senior Federal Consel), *Lim Beng Choon* (Senior Federal Counsel) with him, for the respondents.